UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

NEW YORK-PRESBYTERIAN BROOKLYN METHODIST HOSPITAL

and **Case No. 29-CA-247813**

NEW YORK STATE NURSES ASSOCIATION

ORDER DENYING RESPONDENT'S MOTION TO POSTPONE THE HEARING AND IN OPPOSITION TO CONDUCTING THE HEARING BY VIDEOCONFERENCE

The Complaint and Notice of Hearing in this matter, issued on December 23, 2019, alleges that New York-Presbyterian Brooklyn Methodist Hospital (Methodist or Respondent) violated Section 8(a)(1) of the Act by selectively and disparately enforcing its dress code policy to unlawfully prohibit wearing buttons pertaining to the New York State Nurses Association (NYSNA or the Union) in patient care areas. On January 23, 2020, Methodist filed an Answer denying the Complaint's material allegations.[1]

On March 18, 2020, I issued an Order adjourning the hearing, which was scheduled to begin on March 30, 2020, indefinitely due to the impact of the Coronavirus (COVID-19) pandemic in the New York City area. On June 3, 2020, the Regional Director, Region 29, issued an Order postponing the hearing until August 11, 2020, and stating that the hearing was "**to be conducted by videoconference or, if circumstances allow**," at the offices of Region 29, at Two MetroTech Center, 5th Floor, Brooklyn, New York (emphasis in original). The parties have subsequently agreed to adjourn the hearing to September 23, 2020.

On July 14, 2020, Methodist filed a Motion to Postpone the Hearing and in opposition to conducting the hearing by videoconference. After discussions during a conference call on July 15, 2020, Methodist filed a Memorandum of Law in support of its Motion to Vacate the Regional Director's order directing that the hearing be conducted by videoconference on July 21, 2020. In its papers, Methodist seeks to postpone the hearing until "a date beyond the emergency created by the COVID-19 pandemic," contending that an in-person hearing cannot be conducted safely. Methodist further argues that conducting an unfair labor practice hearing by videoconference would deny it due process and contravene existing Board Rules and Regulations and the

[1] Methodist filed a Motion to Dismiss the Complaint, which was denied by the Board on April 20, 2020. Methodist also filed a Motion for a Bill of Particulars, which was denied by Associate Chief Administrative Law Judge Kenneth W. Chu on March 12, 2020.

Administrative Procedure Act, and would be arbitrary and capricious given its possibly detrimental impact on the integrity of the hearing process and on public access to Board proceedings. NYSNA filed an Opposition to Methodist's Motion on July 28, 2020, contending that the current circumstances created by the COVID-19 pandemic constitute good cause for holding a hearing by videoconference, and that appropriate safeguards could adequately protect due process and ensure the integrity of the hearing. Counsel for the General Counsel (General Counsel) requested a one week extension of time to submit its position, and on August 4, 2020, filed a Response to the Motion consisting in its entirety of the following: "Counsel for the General Counsel takes no position on Respondent's Motion. However, Counsel for the General Counsel is prepared to proceed to trial via Zoom if ordered to do so by Your Honor."[2]

There is no dispute that the hearing in the instant case cannot be conducted safely in person at the offices at Region 29. Methodist and NYSNA both argue as much, given the impact of the COVID-19 pandemic in the New York City area. In these unique circumstances, General Counsel's inability to take a position regarding the participants' physical safety at a hearing which would take place in the Agency's own offices is disconcerting.[3] However, I have extensive direct experience with Region 29's facilities, having heard numerous cases at that office over the past nine years. Given the Agency's standard practices and procedures, an in-person hearing in this case would likely require the continuous presence of eight people at a minimum – myself, the court reporter, and at least one attorney and representative for each of the three parties – and the intermittent presence of various witnesses. Based upon my experiences with the facilities available prior to the pandemic, I concur with Methodist and NYSNA's assessment that it would be impossible to comply with the currently accepted social distancing protocols during an in-person hearing in the instant case. Thus, I find that due to the safety concerns created by the COVID-19 pandemic an in-person hearing is not possible at this time.

Methodist also contends that the hearing in this case should not be held via videoconference. Methodist advances two general lines of argument to support this position – one grounded in the purported lack of legal authority on the part of the Agency and the Administrative Law Judge to direct that a hearing be held by videoconference, and one based on the pragmatic impact of a videoconference hearing on due process and the integrity of the hearing process.[4] For the following reasons, I

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[2] As discussed by Methodist on page one, footnote two of its Memorandum, General Counsel agreed during the July 15, 2020 conference call that the videoconference hearing issue was properly before me, as opposed to the Regional Director, even though the hearing date was more than 21 days away. Methodist also filed a Reply to NYSNA's Opposition on August 12, 2020.

[3] The Agency's website describes Region 29's offices and building as "Available" and its staff as "in non-mandatory teleworking status" in connection with the COVID-19 pandemic, but provides no further information. See https://www.nlrb.gov/field-office-status.

[4] Methodist also contended in its Motion that it is unable to prepare for the hearing due to the responsibilities of its personnel in providing patient care in connection with the COVID-19 pandemic, restrictions on hospital visitation, and the closure of its counsel's office. However, NYSNA, whose witnesses are presumably health care professionals in a similar position, raises no such concerns. NYSNA also points out that Methodist, a 591-bed acute care hospital, ostensibly has adequate equipment

find that the existing NLRB Rules and Regulations, and the pertinent Board decisions, provide sufficient legal support for an order directing that the hearing take place by videoconference. I further find that the pragmatic concerns raised by Methodist can be adequately addressed through the Zoom videoconferencing platform which will be used to conduct the hearing in this case.

Section 102.35 of the National Labor Relations Board Rules and Regulations addresses the "Duties and powers of Administrative Law Judges." This provision empowers the ALJ to "Regulate the course of the hearing," "Dispose of procedural requests," "Approve stipulations, including stipulations of facts that waive a hearing," "Call, examine, and cross-examine witnesses," "introduce into the record documentary or other evidence," and "Take any other necessary action authorized by the Board's published Rules and Regulations." NLRB Rules and Regulations, Sec. 102.35(a)(6), (8), (9), (13). Pursuant to Section 102.35(c), "video testimony by contemporaneous transmission from a different location" is permissible in unfair labor practice cases "[u]pon a showing of good cause based on compelling circumstances, and under appropriate safeguards."[5] Section 102.35(c)(2) provides that safeguards for videoconference testimony must "ensure" that the ALJ can "assess the witness's credibility" and that "parties have a meaningful opportunity to examine and cross-examine the witness." Section 102.35(c)(2) further states such that safeguards

> must include at a minimum measures that ensure that representatives of the parties have the opportunity to be present at the remote location, the judge, participants, and the reporter are able to hear the testimony and observe the witness, the camera view is adjustable to provide a close-up view of counsel and the witness and a panoramic view of the room, exhibits used in the witness's examination are exchanged in advance of the examination, and video technology assistance is available to assist with technical difficulties that arise during the examination.

The Board recently noted in *Morrison Healthcare* that the "safeguards" contained in Section 102.35(c) are fundamentally intended to protect due process and ensure that witness credibility can be adequately assessed by "enabl[ing] the observation of the witness at all material times." 369 NLRB No. 76 at p. 1 (2020), quoting *EF International Language Schools*, 363 NLRB No. 20 at p. 1, fn. 1 (2015), enf'd. 673 Fed.Appx. 1 (D.C. Cir. 2017).

Section 102.35(c) addresses the video testimony of an individual witness or witnesses during an otherwise in-person hearing. See *Morrison Healthcare*, 369 NLRB No. 76, at p. 1, fn. 2. However, the Board recently held that the current Coronavirus

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and internet access to prepare for a videoconference hearing. Finally, I note that despite the closure of Methodist counsel's office, several counsel have participated in the two conference calls I conducted in this case, and Methodist has timely filed a number of well-prepared Motion papers.

[5] Methodist argues that a videoconference hearing is inappropriate because no written application has been filed pursuant to Section 102.35(c)(1) of the NLRB Rules and Regulations. Memorandum at 12. To the extent that a written application is necessary in this unprecedented situation, NYSNA argues in its Opposition that the hearing in this case should be conducted by videoconference.

(COVID-19) pandemic constitutes "compelling circumstances" which justify the use of videoconference technology for an entire remote hearing pursuant to Section 102.35(c).[6] See *Morrison Healthcare*, 369 NLRB No. 76, at p. 2. In *Morrison Healthcare*, the Board therefore determined that a Regional Director may conduct a hearing in a representation case by videoconference because "the current Coronavirus Disease (COVID-19) pandemic constitutes 'compelling circumstances' warranting a remote pre-election hearing."

Methodist argues that *Morrison Healthcare* is irrelevant on several different grounds. First, Methodist argues that *Morrison Healthcare* is inapposite because representation case hearings are "fact-finding hearings," which are "not adversarial in nature" and do not involve credibility resolutions. Memorandum at 6-7, quoting *Springfield Terrace, Ltd.*, 355 NLRB 937, 940 (2010). However, in *Morrison Healthcare*, the Board noted that in representation case proceedings, "the potential impairment of cross-examination, or the inability to detect whether testimony is being guided by documents or coached by another individual, remain salient." 369 NLRB No. 76 at p. 2. Because these are precisely the pragmatic and due process issues being raised by Methodist here, I find that the Board's *Morrison Healthcare* decision is instructive. Methodist further quotes the Board's footnote two on page one of *Morrison Healthcare* stating that, "the safeguards set forth in Sec. 102.35(c) address the taking of a single witness's testimony via video transmission in an otherwise in-person hearing, and they consequently may not apply in all respects to a hearing conducted entirely via video conference." Methodist appears to interpret this language as prohibiting a hearing conducted entirely by videoconference, regardless of whether appropriate safeguards were imposed. Memorandum at 7. However, I read this language as implying that the safeguards enumerated in Section 102.35(c) may be less rigidly imposed in a hearing conducted entirely by videoconference, or may be modified as appropriate. Indeed, in the footnote's next sentence the Board states that with respect to a hearing conducted entirely by videoconference, "[w]e leave it to the hearing officer in the first instance to impose appropriate safeguards, *informed but not controlled by* those listed in Sec. 102.35(c)(2)." *Morrison Healthcare*, 369 NLRB No. 76 at p. 1, fn. 2 (emphasis added). This language clearly envisions that in a hearing conducted entirely by videoconference, the adjudicating hearing officer will develop procedural safeguards consonant with the goal of allowing meaningful direct and cross-examination and ensuring the adequate observation of the witness for credibility purposes by "enab[ling] observation of the witness at all material times." However, it also plainly anticipates that the "appropriate safeguards" necessary to achieve these objectives may not be entirely determined "by those listed in Sec. 102.35(c)(2)."[7] Such reasoning is even more cogent in the instant

[6] After the instant order was prepared, the Board in *William Beaumont Hospital*, 370 NLRB No. 9 (2020), found that an Deputy Chief Administrative Law Judge Arthur Amchan did not abuse his discretion in ordering a videoconference unfair labor practice hearing in the context of the COVID-19 pandemic.

[7] The Board took a similar position in *MPE, Inc.*, unpub. Board order issued Jan. 29, 2015 (2015 WL 400660), which was decided prior to the inclusion of safeguards for videoconference testimony in Section 102.35. In that Order, the Board found that the ALJ in an unfair labor practice case erred in denying General Counsel's Motion to allow the video testimony of one witness who was incarcerated. While the Board referred to procedural safeguards contained in a Pilot Video Testimony Program in Representation Cases then in effect, it ultimately stated that the video testimony should be taken "subject to appropriate

case, given that Section 102.35(c)(2) explicitly empowers an ALJ to "impose additional safeguards" with respect to remote video testimony. Thus, for the foregoing reasons, I find that Section 102.35 of the Board's Rules and Regulations and the Board's decision in *Morrison Healthcare* both provide pertinent legal authority for an order directing that the hearing in the instant case be conducted by videoconference.[8]

Methodist also raises a number of practical issues regarding the conduct of a videoconference hearing which it claims will result in a denial of due process, impair the integrity of the hearing process, and subvert public access to the Agency's case adjudication. Based upon my own training and use of the Zoom videoconference technology licensed by the Agency, together with other platforms available and useful in the videoconference setting, these concerns can in my judgment be adequately addressed. For example, with respect to witness testimony, Methodist contends that a videoconference hearing will impede its ability to confront witnesses and establish their evasiveness. Memorandum at 3. However, the Zoom platform provides for a clear view of all participants, and a closer view of the participants' faces than is often possible during an in-person hearing. Methodist also claims that in a videoconference hearing witnesses will be evaluated "on their general appearance or their video surroundings, chosen video background, or the strength of their internet connection." Memorandum at 3. Witnesses will be prohibited from using a "virtual background" on the Zoom platform, and witnesses and the attorneys presenting them will be instructed regarding placement of the camera being used as part of their equipment, so that a witness' body and surroundings will be encompassed by the video to the fullest extent possible. As part of their trial preparation, attorneys can work with their clients and the witnesses they intend to present to ensure access to technologically adequate equipment, with issues resolved as much as possible prior to the inception of the hearing, and as necessary after the trial begins.[9] General training regarding the Zoom platform is available on the company's website, training specific to videoconference trials using the platform is commercially available, and use of the platform can be incorporated into the witness preparation that trial attorneys must perform in any event. Methodist further contends that during a remote hearing "effective control" over the presence of or witness communications with individuals who could "coach" their testimony would be impossible.

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procedural safeguards to preserve the due process rights of the parties," determined by the parties' mutual agreement. The Board further stated that if the parties were unable to agree, the ALJ "shall implement such procedural safeguards as he believes are appropriate," so long as the circumstances "provide the parties with a meaningful opportunity to examine and cross-examine the witness," and "give the judge the appropriate ability to assess…demeanor for the purpose of assessing…credibility."

[8] Based upon the Board Rules and Regulations and precedent described above, Methodist's argument that an Order directing that the hearing be conducted by videoconference would violate the Administrative Procedure Act is rejected. Memorandum at 8-9.

[9] A Courtroom Deputy will also be available to participate in the videoconference hearing in order to provide technical assistance. The *McDonald's USA, LLC* case discussed by Methodist, which I heard for 155 days over a three year period, involved a Glowpoint audiovisual network and CenturyLink internet, technology completely different from the Zoom videoconference platform being deployed by the Agency at this time. Memorandum at 4-5. Furthermore, as I noted in my Order Denying Motions to Approve Settlement Agreements, the various Respondents in that case not only refused to take a reasonable or cooperative approach to the use of videoconference technology, but actively worked to undermine its efficacy. See *McDonald's USA, LLC*, 368 NLRB No. 134 at p. 22 (2019).

Memorandum at 3-4, 5. However, this issue can be addressed via a sequestration order,[10] and by explicit instructions to the witnesses and attorneys, to provide clear direction regarding their obligations and restrictions on interaction with others. Methodist also argues that testimony by videoconference will impair the ALJ's ability to make credibility resolutions. Memorandum at 3. Having some familiarity with the Zoom videoconference platform being deployed by the Agency, it does not appear that observation of witness demeanor in the form of facial expressions and gestures would be meaningfully hampered.[11]

Methodist also contends that holding a hearing by videoconference will impair the effective use of documentary evidence in several respects. Memorandum at 4, 13. Based upon Agency training and my experience with Zoom videoconferencing and other available platforms for the digital exchange of documents, I disagree. Documents can be presented to other parties, myself, and witnesses by mail in a sealed envelope with appropriate stipulations, via the screen-sharing feature on the Zoom platform, by e-mail, or by the use of a SharePoint website created specifically by the Agency for a particular case.[12] Copies of witness statements can be provided to opposing counsel immediately after the witness' direct testimony in a similar manner. Counsel will presumably address pertinent documents while preparing prospective witnesses to testify, as would happen during witness preparation for an in-person hearing. Documents can be retrieved and presented to witnesses during cross-examination using these methods as well. Negotiated pre-hearing resolution of evidentiary issues, including stipulations regarding authenticity and admissibility, and a good-faith, reasonable approach to the production of documents and the use of documentary evidence, will facilitate the efficiency of the videoconference hearing process.[13]

Finally, the inevitable differences between an in-person and videoconference hearing must be weighed against the only other course – the indefinite delay of the hearing and decision in this case. As discussed above, I concur with Methodist and NYSNA's assertion that an in-person hearing cannot be conducted at this time in a manner which will be physically safe for the participants. Therefore, the only alternative

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[10] In addition to the standard sequestration order typically issued on the record, the Zoom platform includes a "waiting room" to which witnesses can be confined before their testimony begins, and other methods for excluding witnesses who are not permitted to observe the testimony of others. For the standard sequestration order issued in Agency hearings, see *Greyhound Lines*, 319 NLRB 554 (1995).

[11] In *East End Bus Lines, Inc.*, cited by Methodist at pages 9-10 of its Memorandum, any technical difficulties which occurred during the video testimony did not ultimately prevent the ALJ from making a credibility resolution with respect to the witness involved. 366 NLRB No. 180 at p. 26, fn. 5, and at p. 30 (2018) (testimony of Rosehanna Pometti). In addition, the record does not indicate that the Zoom videoconference platform being deployed by the Agency at this time was used in that case.

[12] Separate folders can be created in Share Point so that only one party has access to the materials they contain. A SharePoint website was used by the parties throughout the hearing in *McDonald's USA, LLC* to provide documents to one another and to view documentary evidence during witness testimony, without significant incident.

[13] Methodist also argues that a videoconference hearing will not be open to the public. Memorandum at 14, quoting NLRB Rules and Regulations, Sec. 101.10, 102.34. However, the Zoom platform contains features which will allow non-participants to attend and observe hearings, and can be implemented in conjunction with the ALJ and the NLRB Regional Office involved.

to conducting the hearing by videoconference is an indefinite postponement of the hearing for an uncertain period of time, until people are able to gather in the manner necessary for an in-person hearing without threatening public health and safety, which could possibly be years. Such a result is contrary to the policy favoring expeditious resolution of disputes arising under the Act evinced by, for example, the six month period of time set forth in Section 10(b) for filing unfair labor practice charges, and the deliberate omission of a pre-trial discovery process in Board proceedings. See, e.g., *David R. Webb Co.*, 311 NLRB 1135, 1135-1136 (1993) (pre-trial discovery not "routinely available" in Board cases because "it can be productive of delay, offering, as it does, abundant opportunities for collateral disputes"); *Emhart Industries, Hartford Div. v. NLRB*, 907 F.2d 372, 378 (2d Cir. 1990) ("importance of promptly resolving unfair labor charges" evident, given that "[p]re-trial discovery, perhaps the primary source of delay in civil actions, is almost never allowed by the Board"). Given the critical considerations of procedural due process and effective enforcement implicated here – and General Counsel's responsibilities in issuing the Complaint, presenting evidence to substantiate its allegations, and contending that outstanding violations exist which must be remedied – it is unfortunate that General Counsel takes no position with respect to this Motion. But in my determination, the relatively minor inconveniences and shortcomings which may arise in connection with a videoconference hearing are substantially outweighed by the public policy concerns supporting efficient enforcement of the Act during these unprecedented circumstances.

For all of the foregoing reasons, Methodist's Motion is denied, and the hearing in this matter will proceed remotely via the Zoom videoconference platform on September 23, 2020.

Dated: New York, New York
August 18, 2020

Lauren Esposito
Administrative Law Judge